FILE COPY

FILED
OCT 21 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 536

October Term, 1946.

CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,
Petitioners,

vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH G. LOCKWOOD,
ELMER L. GOLDSMITH,
1210 Fletcher Trust Bldg.
Indianapolis, Indiana,
DWIGHT B. GALT,
Washington Loan & Trust Bldg.
Washington, D. C.
Attorneys for Respondents.

INDEX

PAGE

1. Summary and Short Statement of the Matter Involved 1

2. Respondents' Statement of the Case 3

3. Argument 7

TABLE OF CASES CITED

General Picture Corp. vs. Western Electric Co., et al., 302 U. S. 175 7

Layne and Bowler Corp. vs. Western Well Works, 261 U. S. 387, 393 8

Southern Power Co. vs. North Carolina Public Service Co., et al., 263 U. S. 508 8

United States vs. Chemical Foundation, 272 U. S. 1, 14 8

United States vs. Johnston, 268 U. S. 220 8

IN THE

Supreme Court of the United States

No. 536

October Term, 1946.

CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,
Petitioners,

vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari on the ground that:

> "both the Lower Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to warrant the Supreme Court to exercise its power of supervision and its sound judicial discretion." (Pet. p. 3)

But nothing of material consequence is found in the petition or the supporting brief with respect to the judicial proceedings of the lower courts. All that is said in support of this petition appears in the last paragraph of page 3, and Item 1 of the "Errors Assigned", appearing on page 15.

As petitioners have pointed out, a hearing was held before the Trial Court on February 19 and 20, 1945. On October 4, 1945, the Trial Court filed its findings of fact, conclusions of law and discussion, as reported in 62 Fed. Supp. 473.

There appears to be no suggestion by petitioners that the Trial Court in any way departed from the accepted and usual course of judicial proceedings.

The only other reference to the grounds for the petition is found on page 15 under the title "Errors Assigned". It is there merely stated that:

> "The opinion of the Court of Appeals of the Third Circuit does not review the evidence, is but eleven printed lines long and ends with the statement: 'We cannot say that his conclusion was clearly erroneous. The judgment is affirmed.'"

The Third Circuit Court of Appeals, upon filing of briefs and oral argument by both parties, rendered its decision PER CURIAM as follows:

> "The points presented in this appeal are, in our opinion, purely questions of fact. The chief one of these is whether one or the other witness, upon whose testimony the outcome of the lawsuit depended, was telling the truth. The appellants say the trial judge should have answered the question contrary to the way he did answer it. The conclusion upon the question of credibility is peculiarly one for the trier of the fact. Upon this and the other issues of fact **there is ample testimony to support the conclusion of the District Judge** and we cannot say that his conclusion was clearly erroneous.
>
> "The judgment is affirmed."

The petition fails to point out wherein the Court of Appeals in any way departed from the accepted and usual course of judicial proceedings. Nothing is found in the petition to support the assertion that the court did "not review the evidence."

The remaining "Errors Assigned" are in no way related to the question upon which the petition is based, namely, whether or not the lower courts departed from the accepted and usual course of judicial proceedings. But rather the "Errors Assigned" and the balance of the seventy-eight page supporting brief are directed only to a discussion and argument of those questions of fact and presumption upon which the lower courts ultimately arrived at their decision,—in accord with the usual and proper judicial proceedings.

Respondents' Statement of the Case

Respondents must note the inaccuracies and omission of facts in the petition, pages 3 to 15, inclusive; and as more correctly stated in the findings of fact and discussion of the Trial Court. Petitioners' so-called "Summary and Short Statement of the Matter Involved" is mainly directed to unproven allegations and unwarranted presumptions. Thus, the patent in suit was not assigned to Chas. Drexler Co., Inc., as alleged; the Koza patent No. 2,229,509 was a later improvement patent having no bearing upon the matter of infringement or validity of the patent sued upon. Among some of the unfounded statements is that made by petitioners in respect to the Puget Sound Navy Yard tool being a heavy angle drill, and too large for the purposes sugggested, and that Exhibits

A and B were witnessed by one Eric Ischinger,—of which there is no proof in the record.

There is nothing in the record to support the assertion that the angle drill of Exhibits A and B was a secret with Koza, or that Koza ever made the drawing Exhibit U while in Baltimore, Maryland, or any other time. Certainly, there is no evidence to support the statement made in the petition to the effect that Koza disclosed to Drexler the invention in suit by drawing it on a blue print in pencil or otherwise. There is nothing in the record to support the statement that Drexler could not have written the specifications and claims of the patent in suit. Petitioners fail to include the fact, in their statement on page 14, that Koza filed and prosecuted his patent application which issued into his patent No. 2,229,509 without at any time claiming the invention in issue as his, if at that time he had so considered it. Having made no such claim, obviously the Patent Office could not have withheld Drexler's patent and declared an interference. There was no interference with the claims of the patent in suit because the invention thereof was never claimed by Koza.

The true facts are as set forth in the Trial Court's findings of fact and memorandum (62 Fed. Supp. 473-476).

This cause arose from the usual complaint alleging infringement of a patent. Infringement was admitted. Validity of the patent was brought in question presumably on the ground that the patentee was not the original inventor of the invention claimed, alleging the invention to be that of the defendant Koza, and that Koza disclosed it in confidence to the patentee Drexler.

This defense was by way of a counterclaim which also alleged breach of confidence.

Therefore, validity of the patent was the ultimate issue of both the complaint and the counterclaim, the determining question being whether or not the invention was original with the patentee or had been disclosed to the patentee by the defendant in confidence. This was a question of fact to be determined by the Trial Court. It developed into a question of the credibility of the witnesses. The Trial Court heard the witnesses in open court, and had the opportunity of considering their testimony given on the stand. Thereupon and after full consideration of the proofs, the Court found as a fact that the evidence was insufficient to sustain the defense of invalidity and defendants' counterclaim of breach of confidence.

The Trial Court heard testimony for two days, and some months later arrived at its findings of fact and conclusions of law,—all in accordance with the accepted and usual course of judicial proceedings.

An appeal was taken to the Third Circuit Court of Appeals November 20, 1945, after which petitioners obtained an extension of time to February 25, 1946, in which to file their printed brief and appendices.

Petitioners failed to file their brief and appendices within their time. They remained in default until the case was noticed for hearing May 20, 1946. In the intervening three months the default existed without extension or motion for continuance. (Rec. 167-169).

Upon the appeal being set for argument, respondents moved for a dismissal on the ground that Rules 26 and 27 of the Third Circuit Court of Appeals had not

been complied with. But on May 20, 1946, the Court favored the petitioners, and in its discretion denied the motion.

After so favoring the petitioners, the Court permitted them to file their brief and appendices, after three months in default, and gave them additional time after denying the motion May 20th.

The Court of Appeals in arriving at its decision, had before it petitioners' brief and appendices, and heard the argument of counsel for petitioners, wherefore the appeal was fully presented and heard by the Court irrespective of petitioners' default.

If there was any departure by the Court of Appeals from the accepted and usual course of judicial proceedings, it was entirely in favor of the petitioners, by permitting the appeal to be fully presented after a three months default in breach of its rules.

ARGUMENT.

It is believed that this petition should be denied on the grounds set forth in this Court's opinion in **General Picture Corp. vs. Western Electric Co., et al.**, 302 U. S. 175, and particularly the following portion thereof:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. vs. N. C. Public Service Co., 263 U. S. 508. United States vs. Jonhston, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. United States vs. Chemical Foundation, 272 U. S. 1, 14. United States vs. McGowan, 290 U. S. 502. Alabama Power Co. vs. Ickes, 302 U. S. 464. There is evidence to support them. Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of circuit courts of appeals. Layne and Bowler Corp. vs. Western Well Works, 261 U. S. 387, 393. Keller vs. Adams, Campbell Co., 264 U. S. 314, 319-320. Stilz vs. United States, 269 U. S. 144, 147-148."

While this petition is presented on the ground that the lower courts have departed from the accepted and usual course of judicial proceedings, it appears from the summary and short statement, and particularly the "Errors Assigned", and "Argument", that petitioners are really seeking a review of the facts and presumptions arising from the testimony of the witnesses and exhibits offered. As set forth in the above opinion, granting of the writ would not be warranted merely to review this evidence or the inferences drawn from it, and particularly wherein the lower court's decision rests on concurrent findings which should not

be disturbed unless plainly without support. Where there is no conflict between the decisions of the Circuit Court of Appeals a writ will not be granted merely to review questions of fact involving validity of a patent.

The controversy here primarily arises out of controverted questions of fact.

In **Southern Power Co. vs. North Carolina Public Service Co., et al.,** 263 U. S. 508, the Court said:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition, and if sufficiently developed, would not have moved us thereto."

In **United States vs. Johnston,** 268 U. S. 220, the Court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."

In **United States vs. Chemical Foundation,** 272 U. S. 1, 14, the Court held that:

> "Findings of fact concurred in by two lower courts will not be disturbed, unless clearly erroneous. Washington Sec. Co. vs. United States, 234 U. S. 70, 78, 34 S. Ct. 725, 58 L. Ed. 1220. Under this rule the findings must be accepted."

In **Layne vs. Bowler Corp. vs. Western Well Works,** 261 U. S. 387, 393, Chief Justice Taft said:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished

from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

The respondents therefore rely upon and make a part of their brief in opposition, the record below including the exhibits there received in evidence and the facts as found and set forth by the trial court in its findings of fact, conclusions of law and memorandum in support thereof, and including the concurring decision per curiam of the Third Circuit Court of Appeals.

The petition should be denied as failing to point out wherein the Circuit Court of Appeals or the Trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and particularly wherein Paragraphs 2-9, inclusive, of the "Errors Assigned" do not present matters reviewable upon petition for writ of certiorari.

Respectfully submitted,

RALPH G. LOCKWOOD,
ELMER L. GOLDSMITH,
DWIGHT B. GALT,
Attorneys for Respondents.

Indianapolis, Indiana
October 16, 1946